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PUBLIC OR PRIVATE? THE SPLIT OVER FIRST AMENDMENT PROTECTION OF UNION SPEECH BY PUBLIC EMPLOYEES

Abstract: On May 16, 2018, the Second Circuit held, in *Montero v. City of Yonkers*, that a police officer who criticized other officers at a union meeting and then sued for retaliation in the wake of his remarks spoke “as a private citizen” and was therefore protected by the First Amendment. However, the Second Circuit limited its ruling by refusing to adopt a *per se* rule that any person who speaks as a union member speaks “as a private citizen” and is therefore protected from retaliation by the First Amendment. By specifically refusing to adopt a *per se* rule on union speech, the Second Circuit split from the Sixth, Seventh, and Ninth Circuits, which have established categorical rules stating that union speech is distinct from employee speech. This Comment argues that the categorical rules regarding union speech adopted by the Sixth, Seventh, and Ninth Circuits are in accordance with the Supreme Court’s decision in *Janus v. American Federation of State, County, and Municipal Employees*, and that the Second Circuit was therefore incorrect in its decision not to adopt such a categorical rule.

INTRODUCTION

In 2015, a police officer named Raymond Montero brought a 42 U.S.C. § 1983 suit alleging that his superior officers retaliated against him for his criticism of his supervisors at two police union meetings.¹ Montero’s suit was not the first of its kind: in recent years, several circuits have ruled on cases brought by police officers alleging retaliation in violation of the First Amendment for comments made in their capacities as union members.²

¹ See *Montero v. City of Yonkers (Montero I)*, 224 F. Supp. 3d 257, 259–60, 273, 275 (S.D.N.Y. 2016) (holding that a police officer did not have a First Amendment claim because he did not speak “as a private citizen” when participating in a union discussion and dismissing the case with prejudice), *aff’d in part, vacated in part*, 890 F.3d 386 (2d Cir. 2018); Complaint at 1, *Montero I*, 224 F. Supp. 3d 257 (No. 15-CV-4327 (KMK)) (arguing that the defendants had either retaliated against Montero or been complicit in retaliation against him as a result of his speech). Section 1983 of Chapter 42 of the U.S. Code makes certain government entities liable for violations of constitutional rights “cause[d]” by government employees acting under color of state law, when such conduct represents a governmental custom. *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 692 (1978).

² See *Montero v. City of Yonkers (Montero II)*, 890 F.3d 386, 390, 399 (2d Cir. 2018) (holding that a police officer who claimed retaliation “spoke as a private citizen” when he made comments at union meeting, but refusing to establish a *per se* rule that any union member speaking in that capacity does so “as a private citizen”); *Boulton v. Swanson*, 795 F.3d 526, 528–29, 535 (6th Cir. 2015) (holding that a police union member’s remarks at a contract negotiation meeting met the requirements for First Amendment protection, but affirming summary judgment for the de-

However, in deciding *Montero's* case, the Second Circuit split from the Sixth, Seventh, and Ninth Circuits by choosing not to adopt a *per se* rule that a public employee speaks “as a private citizen” when he or she speaks on union matters.³

Part I of this Comment explains the factual and procedural background of *Montero's* case, as well as the Supreme Court precedent on the issue of First Amendment protections for the speech of public employees.⁴ Part II describes the current circuit split between the Sixth, Seventh, and Ninth Circuits, which have adopted categorical rules protecting union speech as the speech of private citizens, and the Second Circuit, which has declined to adopt such a rule.⁵ Finally, Part III argues that the Second Circuit was incorrect in failing to adopt a categorical rule, and that, in doing so, it has diverged from the Supreme Court's reasoning in *Janus v. American Federation of State, County, and Municipal Employees*.⁶

I. EVALUATING FIRST AMENDMENT PROTECTIONS FOR PUBLIC EMPLOYEES IN THE SECOND CIRCUIT

Raymond *Montero's* 42 U.S.C. § 1983 suit for alleged retaliation in violation of his First Amendment rights is not the first of its kind, as the Supreme Court and circuit courts have grappled for decades with the question of how

defendants because the plaintiff failed to show that the actions taken against him were directly tied to his speech rather than various allegations of inappropriate behavior); *Swetlik v. Crawford*, 738 F.3d 818, 826, 829 (7th Cir. 2013) (holding a police officer's statements at a union meeting and in a union grievance were protected, but ruling that the allegedly retaliatory action against the officer was justified on other grounds and therefore upholding summary judgment for the defendants); *Ellins v. City of Sierra Madre*, 710 F.3d 1049, 1060, 1067 (9th Cir. 2013) (holding a police union president's speech criticizing the police chief could be protected, and thus reversing summary judgment for the police chief); *Fuerst v. Clarke*, 454 F.3d 770, 772, 775 (7th Cir. 2006) (holding that summary judgment for a defendant was improper where the plaintiff, a deputy sheriff and union president who criticized his superior, brought a retaliation claim after not receiving a promotion).

³ Compare *Montero II*, 890 F.3d at 390, 399 (holding a police officer who claimed retaliation “spoke as a private citizen” when he made comments at union meeting, but refusing to establish a *per se* rule that any union member who speaks in that capacity does so “as a private citizen”), with *Boulton*, 795 F.3d at 534 (holding that a union member who speaks on union matters speaks “as a citizen” for purposes of First Amendment protection), and *Swetlik*, 738 F.3d at 826 (holding that because a police officer's statements at a union meeting and in a union grievance were made in the context of his union membership, they were not made pursuant to his employment duties and were therefore protected), and *Ellins*, 710 F.3d at 1060 (stating that natural conflicts exist between employers and unions of employees, and therefore ruling that when police officers speak pursuant to their union membership, they do not speak as public employees), and *Fuerst*, 454 F.3d at 774 (stating that a police officer's statements make in the context of his union membership were not part of his job duties as a police officer).

⁴ See *infra* notes 7–49 and accompanying text.

⁵ See *infra* notes 50–75 and accompanying text.

⁶ See *infra* notes 76–88 and accompanying text.

much protection must be afforded to public employee speech under the First Amendment.⁷ Section A of this Part outlines the facts that served as the basis for Montero's claim of retaliation in violation of his First Amendment rights.⁸ Section B provides the procedural history of Montero's case.⁹ Section C provides an overview of the legal background of First Amendment retaliation cases involving public employees.¹⁰

A. Factual Background of Montero II

The facts underlying Montero's § 1983 suit date back to 2009, when Montero worked in the Yonkers Police Department ("YPD") Special Investigations Gang Unit and decided to run for vice president of the Yonkers Police Benevolent Association ("Yonkers PBA").¹¹ The Yonkers PBA elected Mon-

⁷ See *Garcetti v. Ceballos*, 547 U.S. 410, 414–15, 424 (2006) (holding that retaliation against an assistant district attorney who wrote a memo critical of a search warrant affidavit and then testified for the defense at a pre-trial hearing did not violate the employee's constitutional right because the speech was not protected by the First Amendment); *Connick v. Myers*, 461 U.S. 138, 141, 154 (1983) (holding that the termination of an assistant district attorney's employment after she circulated an office questionnaire critical of office policies did not violate her constitutional right to free speech); *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205*, 391 U.S. 563, 564–65 (1968) (holding that retaliation against a public school teacher who wrote a letter to the editor of a newspaper criticizing the school board was an unconstitutional violation of the teacher's First Amendment rights); *Montero II*, 890 F.3d. at 390, 399 (holding a police officer who claimed retaliation "spoke as a private citizen" when he made comments at a union meeting, but refusing to establish a *per se* rule that any union member who speaks in that capacity "speaks as a private citizen"); *Boulton*, 795 F.3d at 528–29, 535 (holding a police union member's remarks at a contract negotiation meeting met the requirements for First Amendment protection, but affirming summary judgment for the defendants because the plaintiff failed to show that the actions taken against him were directly tied to his speech rather than various allegations of inappropriate behavior made against him); *Swelick*, 738 F.3d at 826, 829 (holding police officer's statements at a union meeting and in a union grievance were protected but ruling that the termination charges against the officer were justified on other grounds and therefore upholding summary judgment for the defendants); *Ellins*, 710 F.3d at 1060, 1067 (holding a police union president's speech criticizing the police chief could be protected, and thus reversing summary judgment for the police chief); *Fuerst*, 454 F.3d at 772, 775 (holding that summary judgment for a defendant was improper where a deputy sheriff and union president who criticized his superior brought a retaliation claim after not receiving a promotion). See generally Marni M. Zack, Note, *Public Employee Free Speech: The Policy Reasons for Rejecting a Per Se Rule Precluding Speech Rights*, 46 B.C. L. REV. 893, 894 (2005) (outlining Supreme Court precedent on public employee free speech and explaining that public employee speech may be more restricted under the First Amendment than ordinary citizen speech).

⁸ See *infra* notes 11–25 and accompanying text.

⁹ See *infra* notes 26–29 and accompanying text.

¹⁰ See *infra* notes 30–49 and accompanying text.

¹¹ *Montero I*, 224 F. Supp. 3d at 259–60; Complaint, *supra* note 1, at 4. Yonkers Police Benevolent Association ("Yonkers PBA") is the Yonkers Police Department ("YPD") employee union. *Montero II*, 890 F.3d. at 391. Montero's complaint stated that at the time of his suit, Montero had been a police officer in Yonkers for more than twenty-six years. Complaint, *supra* note 1, at 1. Edmund Hartnett was the commissioner of the YPD from 2006 to 2011. *Id.* at 3. At the time of Montero's suit, Keith Olson was a police officer with the YPD and the president of Yonkers

tero as vice president of the union and another police officer, Keith Olson, as president in January 2010.¹²

During a Yonkers PBA meeting in 2010, Montero criticized YPD Commissioner Edmund Hartnett for his decision to discontinue several police units, arguing that the cuts would cause problems for the YPD and the City of Yonkers.¹³ According to Montero, in July 2010, Lieutenant John Mueller called Montero into his office and threatened to transfer Montero to another unit if he did not stop speaking out against Commissioner Hartnett.¹⁴ Montero nonetheless called for a vote of no confidence in Hartnett at a Yonkers PBA meeting in February 2011.¹⁵

According to Montero, after his speech at the 2011 Yonkers PBA meetings, Olson, Lieutenant Mueller, and Detective Sergeant Moran retaliated against him.¹⁶ In March 2011, Olson, Mueller, and Moran conducted an unapproved investigation into Montero's overtime reporting.¹⁷ The following month, Montero was transferred out of the Special Investigations Unit to the Detective Division.¹⁸ In September 2011, Mueller allegedly conducted a second unapproved investigation of Montero related to Montero's supposed insubordination, and Olson verbally accosted Montero.¹⁹

PBA. *Id.* Brian Moran was a Detective Sergeant with the YPD. *Id.* John Mueller was a police officer with the YPD and, beginning in May 2015, served as Chief of Support Services. *Id.*

¹² *Montero II*, 890 F.3d at 391. Montero alleged that throughout the election season, Olson expressed opposition to Montero and instead advocated for Officer Michael Farina to be elected vice president. *Id.*

¹³ *Id.* The units to be cut included a unit "dedicated to investigating domestic violence and burglary" and a "community unit dedicated to supporting the Police Athletic League." *Id.* At the June 2010 meeting, Montero also announced his plan to call for a no-confidence vote in Hartnett the next time the Yonkers PBA met. *Montero I*, 224 F. Supp. 3d at 260.

¹⁴ *Montero I*, 224 F. Supp. 3d at 260; Amended Complaint at 4, *Montero I*, 224 F. Supp. 3d 257 (No. 15-CV-4327 (KMK)).

¹⁵ *Montero II*, 890 F.3d at 391.

¹⁶ *Id.*

¹⁷ *Id.* Montero asserted that this kind of investigation had to be performed by the Internal Affairs Division and that the allegations that Montero had falsely reported his overtime work were untrue. *Montero I*, 224 F. Supp. 3d at 260. This investigation resulted in Montero receiving a written disciplinary notice and being denied forty hours of pay. *Montero II*, 890 F.3d at 391.

¹⁸ *Montero II*, 890 F.3d at 391–92. In his Amended Complaint, Montero stated this was a "functional demotion" because the Special Investigations Unit from which he was transferred was more favorable than the Detective Division. Amended Complaint, *supra* note 14, at 5. In this new position, Montero could no longer be paid for overtime work and had to perform "desk duty." *Montero II*, 890 F.3d at 392. Montero asserted that shortly after this, Olson acknowledged that the transfer was the result of Montero's criticism of Olson's and Hartnett's decisions at the prior union meetings. *Id.*

¹⁹ *Montero II*, 890 F.3d at 392. Montero alleged that in September 2011, Olson verbally accosted him after learning that Montero planned to run in opposition to him for president of the union, swore at him, and stated that Olson should "kick his ass." *Montero I*, 224 F. Supp. 3d at 261. Montero's office was also vandalized with pictures of the Cowardly Lion from "The Wizard of Oz" that month, and Montero alleged that Olson planned this vandalism. *Id.* The YPD Internal

Montero further alleged that in January 2012, Olson, Mueller, and Moran engaged in a third unapproved investigation of him, challenging whether Montero was sick when he took sick leave.²⁰ In October 2013, Olson allegedly contacted Montero to say that he wanted to meet Montero “in another jurisdiction and preferably off duty,” which Montero perceived as a threat.²¹ In November of that year, several YPD police officers informed the City of Yonkers’ attorney that Montero was being harassed as a result of his conflict with Olson.²² Finally, at a Yonkers PBA meeting in January 2014, Olson publicly demanded that Montero be removed from the union.²³ Olson later circulated a petition containing allegedly false allegations against Montero.²⁴ Montero was formally removed from the Yonkers PBA in June 2014.²⁵

B. Procedural History of Montero II

After Montero brought his § 1983 suit in the United States District Court for the Southern District of New York, the defendants filed a motion to dismiss the amended complaint on several grounds.²⁶ The district court granted the defendants’ motion to dismiss with prejudice in *Montero v. City of Yonkers* (“*Montero P*”).²⁷ The court held that because Montero’s comments at the

Affairs Department took no action when Montero reported the threats and vandalism. *Montero II*, 890 F.3d at 392.

²⁰ *Montero II*, 890 F.3d at 392. Moran instructed another police officer to seize security footage that documented where Montero had been, and also photographed Montero’s vehicle. *Montero I*, 224 F. Supp. 3d at 261. Montero alleged that he was allowed to leave his home while on sick leave and that the YPD’s Medical Control Unit should have performed the investigation. *Id.* Nonetheless, the YPD deducted two-days’ salary from Montero. *Id.*

²¹ *Montero II*, 890 F.3d at 392. Montero reported this message to the Internal Affairs Division, but the Division took no action. *Montero I*, 224 F. Supp. 3d at 262.

²² *Montero I*, 224 F. Supp. 3d at 262.

²³ *Montero II*, 890 F.3d at 392. Olson’s associates allegedly blocked Montero from leaving the union meeting. *Id.* After the meeting, Olson directed other police officers to confiscate video tapes of the meeting. *Montero I*, 224 F. Supp. 3d at 262. The Internal Affairs Division ultimately investigated this action by Olson and stated that Olson should be subject to discipline for confiscating the tapes. *Id.* No further action was taken, however. *Id.*

²⁴ *Montero II*, 890 F.3d at 392–93. According to Montero, the petition contained false allegations that Montero punched a union trustee at the January 2014 union meeting, among other allegations. *Montero I*, 224 F. Supp. 3d at 262.

²⁵ *Montero I*, 224 F. Supp. 3d at 262.

²⁶ *Montero II*, 890 F.3d at 393; Memorandum of Law in Support of Motion to Dismiss the Amended Complaint at 1, *Montero I*, 224 F. Supp. 3d 257 (No. 15-CV-4327 (KMK)). The City of Yonkers, Brian Moran, and John Mueller moved to dismiss, claiming that Montero had neither an adequate First Amendment claim nor a municipal liability claim, and that Moran and Mueller should be granted qualified immunity. *Montero I*, 224 F. Supp. 3d at 260. Olson also argued that Montero had not established an adequate claim for retaliation that contravened the First Amendment. *Id.*

²⁷ See *Montero I*, 224 F. Supp. 3d at 275. In its ruling, the court noted that Montero had already amended his complaint once, and that at oral argument Montero’s counsel could not produce any additional examples of protected speech by Montero that were not included in the Amended Complaint. *Id.* at 274–75.

June 2010 and February 2011 meetings were not made while Montero acted as a “private citizen,” they were not protected by the First Amendment.²⁸ In January 2017, Montero filed a notice of appeal from the district court’s order granting the defendants’ motion to dismiss.²⁹

C. The Second Circuit’s Reversal and Supreme Court Precedent

On appeal, the Second Circuit, in *Montero v. City of Yonkers* (“*Montero II*”), addressed the question of whether a police officer criticizing other officers at a union meeting speaks as a “private citizen” for purposes of the First Amendment right to free speech.³⁰ The Second Circuit ruled that Montero spoke as an individual citizen when he spoke on union matters, but declined to establish a *per se* rule that all union speech is not made as part of a public employee’s job duties but instead is the speech of “private citizen[s].”³¹

Montero II is the most recent in a series of cases evaluating what type of speech made by public officials is protected by the First Amendment.³² In *Pickering v. Board of Education of Township High School District 205*, the Supreme Court addressed the issue of whether First Amendment protections extend to public employees in the context of a teacher who was fired from his job after writing a letter to a local newspaper criticizing the school board and superintendent’s handling of school revenue proposals.³³ Writing for the ma-

²⁸ *Montero II*, 890 F.3d at 393. The district court stated that Montero’s claim should be evaluated using the two-step analysis for First Amendment retaliation cases brought by public employees: first, evaluating whether Montero spoke in his capacity as a private citizen on a “matter of public concern,” and second, evaluating whether the government employer in question had a legitimate reason for treating its employee differently from a non-employee member of the public. *Montero I*, 224 F. Supp. 3d at 264–65. The district court did not reach the second step of the analysis, however, because it concluded that Montero did not speak in his capacity as a “private citizen.” *Id.* at 265, 273. The court reasoned that because Montero chose to speak at a union meeting that was not open to the public, he did not speak in the same way a non-union, non-employee member of the public would. *See id.* at 271. In deciding that Montero’s speech was not protected by the First Amendment, the court also noted that Montero’s speech was “at least tangentially related” to his official duties. *Id.*

²⁹ Notice of Appeal at 1, *Montero I*, 224 F. Supp. 3d 257 (No. 15-CV-4327 (KMK)).

³⁰ *See Montero II*, 890 F.3d at 390.

³¹ *Id.* at 399.

³² *See, e.g., Garcetti*, 547 U.S. at 414–15, 424 (holding that retaliation against an assistant district attorney who wrote a memo critical of a search warrant affidavit and then testified for the defense at a pre-trial hearing did not violate the employee’s constitutional right because the employee’s speech was not protected by the First Amendment); *Connick*, 461 U.S. at 141, 154 (holding that the termination of an assistant district attorney’s employment after she circulated an office questionnaire critical of office policies did not violate her constitutional right to free speech); *Pickering*, 391 U.S. at 564–65 (holding that retaliation against a public school teacher who wrote a letter to the editor of a newspaper criticizing the school board was an unconstitutional violation of the teacher’s First Amendment rights).

³³ *See Pickering*, 391 U.S. at 564, 565 (holding that the plaintiff teacher’s free speech rights were violated when he was fired after writing a public letter criticizing the Board of Educations’

jority, Justice Marshall declined to outline specific rules for evaluating the statements of public employees.³⁴ The Court, however, made it clear that public employees do not give up their First Amendment right to comment on matters of public concern simply because they are employed by the government.³⁵ Rather, if public employees speak in their capacity as citizens on “matters of public concern,” then those statements are protected by the First Amendment.³⁶ The Court concluded the central issue in such cases was to weigh the interests of the public employee as a private citizen speaking on a public matter with the interests of the government employer trying to effectively complete its duties.³⁷

More than a decade later, the Supreme Court again addressed the issue in *Connick v. Myers*, this time in the context of an assistant district attorney’s termination.³⁸ Writing for the majority, Justice White centered the Court’s analysis on the determination of whether the public employee spoke on a

handling of revenue proposals). The teacher’s letter criticized the school board’s decisions regarding bond proposals and allocation of financial resources for school programs in the district. *Id.* at 566. Additionally, the letter claimed the superintendent had attempted to stop teachers from publicly criticizing the proposal. *Id.* The teacher’s dismissal from his job came after a board hearing which determined that the teacher’s letter was “detrimental to the efficient operation and administration of the schools of the district,” and that under the relevant Illinois statute, a dismissal was necessary. *Id.* at 564–65.

³⁴ *Id.* at 569. The Court reasoned that because the array of scenarios in which a public employee’s critical statements may be deemed grounds for dismissal by superiors is so vast, it would not be appropriate to establish a general rule for evaluating such statements. *Id.* The Court, however, did recognize the need to outline general provisions for how an evaluation of a public employee’s statement should proceed. *Id.* Following *Pickering*, the Supreme Court again refused to establish a general rule for evaluating the statements of public employees in *Connick*. See *Connick*, 461 U.S. at 154 (repeating *Pickering*’s conclusion that it would be unrealistic to establish a general framework for evaluating public employee statements that could justify termination of employment).

³⁵ See *Connick*, 461 U.S. at 140 (citing *Pickering*, 391 U.S. at 568) (quoting *Pickering* and reiterating that government workers do not give up their First Amendment rights to speak on “matters of public interest” simply because they work for the government).

³⁶ See *Pickering*, 391 U.S. at 574 (citing *Garrison v. Louisiana*, 378 U.S. 64 (1964)) (stating that the Court has suggested that public employee speech on “matters of public concern” is protected by the First Amendment even when such speech implicates the employee’s superiors).

³⁷ *Pickering*, 391 U.S. at 568. The Court ultimately reversed, concluding that the teacher commented on a “matter of legitimate public concern,” and that his First Amendment right had been violated. *Id.* at 565, 571.

³⁸ *Connick*, 461 U.S. at 140. In *Connick*, Assistant District Attorney Sheila Myers objected to being transferred to a different department. *Id.* After being transferred in spite of her opposition to such a move, Myers circulated an office questionnaire requesting input from her colleagues concerning various policies within the office, the degree of faith in office leadership, and whether members of the office felt obligated to campaign for certain political candidates. *Id.* at 141. After circulating the questionnaire, Myers’ supervisor notified her that because she would not accept the transfer, she would be dismissed. *Id.* Additionally, the supervisor accused her of defiance for circulating the questionnaire. *Id.*

“matter of public concern.”³⁹ Justice White wrote that the question of whether an employee speaks about a “matter of public concern” must be determined by the full context in which the statement was made.⁴⁰ The Supreme Court later explained in *Garcetti v. Ceballos* that the First Amendment analysis in cases involving allegedly protected speech of public officials must proceed in two parts.⁴¹ Initially, a court must determine whether the employee “spoke as a citizen on a matter of public concern.”⁴² If the employee’s speech was not “as a citizen on a matter of public concern,” then the employee has no First Amendment claim.⁴³ If the employee did speak “on a matter of public concern,” however, the next step in the analysis is to determine whether the gov-

³⁹ See *id.* at 147–48 (stating that even if Myers’ speech was not entirely focused on a “matter of public concern,” it would not necessarily fall outside the scope of First Amendment protection).

⁴⁰ *Id.* The Court used the *Pickering* balancing test to evaluate Myer’s claim and concluded that because one of the questions in her questionnaire involved a “matter of public concern”—namely, whether staff in the office felt obligated to campaign for certain political candidates supported by the District Attorney’s office—it could be protected by the First Amendment. *Id.* at 149; see *Pickering*, 391 U.S. at 568 (describing the need to balance between the public employee’s free speech interest and the government employer’s interest in efficient operation of its duties). Despite this, in the second part of the *Pickering* analysis—evaluating whether Myer’s boss was justified in firing her—the Court concluded that the government interest in efficiently running the District Attorney’s office outweighed the small First Amendment interest at issue. See *Connick*, 461 U.S. at 154 (stating that while Myers had a First Amendment right, this right did not force supervisors to allow speech that could inhibit the functioning of the office); *Pickering*, 391 U.S. at 568 (describing the need to balance between the public employee’s free speech interest and the government employer’s interest in efficient operation of its duties).

⁴¹ *Garcetti*, 547 U.S. at 418. In *Garcetti*, a deputy district attorney, Ceballos, was informed by a defense attorney that an affidavit used to obtain a search warrant contained false information. *Id.* at 413–14. After confirming that the affidavit was inaccurate, Ceballos informed his supervisors of his findings and then prepared a memorandum on the matter. *Id.* at 414. Ceballos’s supervisors nonetheless chose to move forward with a case using the search warrant, and when the trial court held a hearing on the defense’s motion to traverse, Ceballos testified for the defense about his conclusions regarding the affidavit. *Id.* at 414–15. Following his testimony, Ceballos’s supervisors allegedly retaliated against him. *Id.* at 415. The retaliation included Ceballos not receiving a promotion and being transferred both out of his calendar deputy position and to another courthouse. *Id.*

⁴² *Id.* at 418. The Court recognized that the vast array of potential factual situations related to a public employee’s speech can make this analysis challenging. *Id.* However, the Court analyzed several factors to determine whether Ceballos spoke as a citizen about a “matter of public concern.” *Id.* On the issue of whether he spoke as a citizen, the Court stated that the facts that Ceballos’s speech occurred in his office rather than in public, and that the subject matter of his speech related to his employment were not necessarily determinative factors. *Id.* at 420, 421. The Court, however, stated that speech made “pursuant to . . . official duties” of public employees does not constitute private citizen speech under the First Amendment and that since Ceballos’s speech fell under his job duties as a deputy district attorney, he did not speak as a private citizen. *Id.* at 421. Because the parties stipulated that Ceballos’s speech was made pursuant to his job duties, the Court declined to adopt a set of guidelines for assessing the extent of an employee’s job requirements, but specifically noted that employers cannot limit the rights of employees by simply writing vague job descriptions. *Id.* at 424.

⁴³ *Id.* at 418.

ernment had an appropriate reason for treating its employee differently than it would treat a private citizen.⁴⁴

Garcetti specifically addressed the question of whether the First Amendment prohibits retaliation against public employees for statements “made pursuant to the employee’s official duties.”⁴⁵ Writing for the majority, Justice Kennedy explained that while a public employer may limit employee speech, it can only constrain employee speech that could impact the functions of the government organization.⁴⁶ He further stated that when public employees speak as citizens about “matters of public concern,” the government is limited to restrictions that are necessary to ensure the government’s functions are not impeded.⁴⁷ The Court concluded that the decisive element in *Garcetti* was the fact that the employee’s speech had been made “pursuant to his duties.”⁴⁸ The Court ultimately ruled that when public employees speak as part of their official duties, that speech is not protected by the First Amendment.⁴⁹

II. DIVERGENT VIEWS ON CATEGORICAL RULES REGARDING UNION SPEECH

Circuit courts have taken different views on categorical rules regarding First Amendment protection of union speech in the context of public employment.⁵⁰ Section A of this Part summarizes the categorical rules on union speech that the Sixth, Seventh, and Ninth Circuits have adopted in recent

⁴⁴ *Id.*

⁴⁵ *Id.* at 413.

⁴⁶ *Id.* at 418.

⁴⁷ *Id.* at 419.

⁴⁸ *Id.* at 421.

⁴⁹ *Id.* The Court concluded the memorandum written by Ceballos fell into the category of employee statements “made pursuant to official responsibilities.” *Id.* at 424. Therefore, because the First Amendment does not protect employees from retaliation due to statements made as part of their job duties, the Court held that Ceballos did not have an adequate constitutional claim. *See id.* at 421, 424 (stating that Ceballos’s claim failed because the First Amendment allows employers to discipline employees for speech they make as part of their job duties).

⁵⁰ *See* *Montero v. City of Yonkers (Montero II)*, 890 F.3d 386, 390, 399 (2d Cir. 2018) (holding that a police officer who claimed retaliation “spoke as a private citizen” when he made comments at a union meeting, but refusing to establish a *per se* rule that any union member who speaks in that capacity “speaks as a private citizen”); *Boulton v. Swanson*, 795 F.3d 526, 534 (6th Cir. 2015) (holding that a union member who speaks on union matters speaks “as a citizen” for purposes of First Amendment protection); *Swetlik v. Crawford*, 738 F.3d 818, 826 (7th Cir. 2013) (holding that because a police officer’s statements at a union meeting and in a union grievance were made in the context of his union membership, they were not made pursuant to his employment duties and were therefore protected); *Ellins v. City of Sierra Madre*, 710 F.3d 1049, 1060 (9th Cir. 2013) (stating that natural conflicts exist between employers and unions of employees, and therefore ruling that when police officers speak pursuant to their union membership, they do not speak as public employees); *Fuerst v. Clarke*, 454 F.3d 770, 774 (7th Cir. 2006) (stating that a police officer’s statements made in the context of his union membership were not part of his job duties as a police officer).

years.⁵¹ Section B describes the Second Circuit's split from those courts through its decision in *Montero v. City of Yonkers* ("*Montero II*") not to adopt a categorical rule on union speech.⁵²

A. Per Se Rules on Union Speech

Prior to *Montero II*, several circuits had addressed the issue of public employee speech in the context of a union and ruled that such speech cannot be part of the employees' job duties and must be protected from retaliation by the First Amendment.⁵³ The Seventh Circuit addressed the question in *Fuerst v. Clarke*.⁵⁴ In that case, the Seventh Circuit concluded that a police officer did not speak as part of his official job duties when he spoke in his capacity as a union member.⁵⁵ In December 2013, the Seventh Circuit reiterated the distinction between speech made as an employee and speech made by a "private citizen" in the context of First Amendment protections for union members in *Swetlik v. Crawford*.⁵⁶ In evaluating a police officer's claim for retaliation,

⁵¹ See *infra* notes 53–69 and accompanying text.

⁵² See *infra* notes 70–75 and accompanying text.

⁵³ *Boulton*, 795 F.3d at 528–29, 535 (holding that a police union member's remarks at a contract negotiation meeting met the requirements for First Amendment protection, but affirming summary judgment for defendants because plaintiff failed to show that the actions taken against him were directly tied to his speech rather than various allegations of inappropriate behavior made against him); *Swetlik*, 738 F.3d at 826, 829 (holding that a police officer's statements at a union meeting and in a union grievance were protected but ruling that the termination charges against the officer were justified on other grounds and therefore upholding summary judgment for defendants); *Ellins*, 710 F.3d at 1060, 1067 (holding a police union president's speech criticizing the police chief could be protected, and thus reversing summary judgment for the police chief); *Fuerst*, 454 F.3d at 772, 775 (holding that summary judgment for a defendant was improper where a deputy sheriff and union president who criticized his superior brought a retaliation claim after not receiving a promotion).

⁵⁴ See *Fuerst*, 454 F.3d at 774 (stating that there is a difference between an officer speaking in his capacity as a member of a union, and speaking as part of his job duties as an officer). The *Fuerst* case involved a police officer in Milwaukee who served as president of the deputy sheriff's union and publicly criticized Sheriff Clarke about a proposal regarding the hiring of civilians. *Id.* at 771–72. Specifically, Fuerst said that Clarke's plan to fill a job traditionally performed by a deputy sheriff with a civilian was a poor use of tax dollars. *Id.* at 772. Prior to this criticism, Fuerst publicly campaigned against Clarke when the latter ran for sheriff. *Id.* After Fuerst made these statements, Clarke chose not to promote Fuerst, despite the fact that Fuerst had received the second-highest score on the relevant examination out of more than one hundred candidates. *Id.* For purposes of the case, Clarke agreed that he chose not to promote Fuerst as a result of Fuerst's public criticism. *Id.*

⁵⁵ See *id.* at 774 (stating that there is a difference between an officer speaking in his capacity as a member of a union, and speaking as part of his job duties as an officer). The Seventh Circuit made a specific distinction between comments the officer made "in his capacity as a union representative" and comments made "in the course of his employment as a deputy sheriff." *Id.*

⁵⁶ *Swetlik*, 738 F.3d at 826. Brian Swetlik, a police detective from Manitowoc, Wisconsin, brought a claim against several defendants in the City of Manitowoc claiming that his First Amendment rights were violated after the defendants petitioned to have him terminated. See *id.* at 820–21. Swetlik claimed that the goal of terminating him was part of a retaliatory campaign

tion in response to criticisms of the police chief that the officer made as a union member, the Seventh Circuit made a distinction between statements made in an officer's "capacity as a union member" and statements that are "part of his official duties as a police detective."⁵⁷ The court ultimately concluded that the officer's comments at a union meeting and in a list of complaints were protected by the First Amendment.⁵⁸

The Ninth Circuit also addressed the issue of employee speech in the context of union speech in 2013.⁵⁹ In *Ellins v. City of Sierra Madre*, a police officer filed a suit alleging retaliation as a result of speech he made in his position as president of the police union.⁶⁰ Quoting *Connick*, the Ninth Circuit reaffirmed that determination of whether an employee's speech regards a "matter of public concern" requires a context-specific analysis.⁶¹ The court ruled that concerns about the police department were "matters of public concern," and, adopting language from *Fuerst*, that the police officers speaking

against him after he criticized the police chief. *Id.* at 821. Swetlik's criticisms of the chief centered around his claim that, during a phone call between the two of them, the chief instructed Swetlik to lie to jail officers regarding the necessity of interrogation of a suspect in custody. *Id.* at 822. At the police chief's request, the Manitowoc mayor ultimately commenced an investigation into union complaints against the chief, resulting in an investigation report that recommended terminating Swetlik because he had lied about what was said in his phone call with the chief. *Id.* at 822, 823.

⁵⁷ *Id.* at 826.

⁵⁸ *Id.* The Seventh Circuit stated that Swetlik's claims about the police chief went to the issue of the chief's ability to effectively perform his job, which was a concern for public safety. *Id.* at 827. The Seventh Circuit, however, ultimately affirmed the district court's grant of summary judgment because although employers cannot escape First Amendment liability by claiming the employee speech in question was untrue, they can escape liability if "supervisors reasonably believed, after an adequate investigation, that [the employee's] testimony was false, even if it actually was true." *Id.* at 828–29 (quoting *Wright v. Ill. Dep't of Children & Family Servs.*, 40 F.3d 1492, 1506 (7th Cir. 1994)). Because the mayor's investigation indicated that Swetlik had made false statements, the Seventh Circuit held that his termination did not ultimately violate the First Amendment. *Id.* at 829.

⁵⁹ See *Ellins*, 710 F.3d at 1053 (holding that a police officer who led a vote of no confidence in the chief of police and subsequently endured adverse employment actions met his summary judgment burden for establishing retaliation in violation of the First Amendment). *Ellins* involved a claim of retaliation by the president of the Sierra Madre Police Association under 42 U.S.C. § 1983. *Id.*

⁶⁰ *Id.* at 1053–54. After *Ellins* organized a vote of no confidence in the police chief by the police union, the chief refused to help *Ellins* obtain a certification that would have made him eligible for a pay increase. *Id.* Defendants moved for summary judgment after *Ellins* sued, and the district court granted it, ruling that *Ellins* failed to establish an adequate case of First Amendment retaliation. *Id.*

⁶¹ See *Connick v. Myers*, 461 U.S. 138, 147–48 (1983); *Ellins*, 710 F.3d at 1057. The Ninth Circuit adopted language from *Connick* stating that the determination of "[w]hether an employee's speech addresses a matter of public concern" depends on "the content, form, and context of a given statement, as revealed by the whole record." *Ellins*, 710 F.3d at 1057 (quoting *Connick*, 461 U.S. at 147–48). The court distinguished between individual personnel grievances and collective ones, stating that collective union personnel grievances could be considered "matters of public concern." *Id.* at 1057–58.

as members of the police union did not act pursuant to their official duties as public employees.⁶²

In *Boulton v. Swanson*, the Sixth Circuit also addressed the issue of whether speech in the context of a government union is protected under the First Amendment.⁶³ Relying on *Garcetti*, the Sixth Circuit reiterated the two-part analysis, asking first whether the employee spoke as a “citizen on a matter of public concern,” and, if so, whether the employee’s interest in free speech outweighed the government’s interest in restricting the speech.⁶⁴ Applying this test to the case of a police officer alleging retaliation due to remarks he made in a union contract negotiation meeting, the Sixth Circuit adopted a *per se* rule that union activities do not fall within the employment duties of a public employee.⁶⁵ Therefore, public employees speaking on union matters speak as citizens—rather than employees—in the Sixth Circuit.⁶⁶

The Sixth Circuit noted, however, that it has no *per se* rule determining whether a public employee’s union speech references a “matter of public concern.”⁶⁷ The court therefore analyzed the nature and context of the police officer’s comments and determined that they pertained to “matters of public

⁶² *Ellins*, 710 F.3d at 1058, 1060; see *Fuerst*, 454 F.3d at 774 (noting the difference between speech made as part of a public employee’s union membership, and speech that falls under his official job duties). The Ninth Circuit noted that *Fuerst* held that a police officer’s statements as a member of his union are not considered part of his employment duties. *Ellins*, 710 F.3d at 1060 (citing *Fuerst*, 454 F.3d at 772, 774). The Ninth Circuit provided further support for this idea by noting that there is an “inherent institutional conflict of interest” between employers and their unions. *Id.* This natural conflict of interest means that a police officer’s comments in his capacity as a union representative are private speech and cannot be part of his official duties. *Id.*

⁶³ See *Boulton*, 795 F.3d at 528 (affirming a grant of summary judgment against an officer who claimed his First Amendment rights were violated when he was demoted—and ultimately suspended—after disagreeing with a superior officer during a contract arbitration meeting). In *Boulton*, a police sergeant in Genessee County, Michigan sought relief for being disciplined after he made remarks contradicting a superior officer at a union contract negotiation. *Id.* at 528–29. After his supervisor spoke about various trainings for police officers, Sergeant Boulton stated that the supervisor had not given an accurate account of the levels of training given to Sheriff’s Officers. *Id.* at 529. After this meeting, Boulton was demoted and then suspended without pay. *Id.* Boulton subsequently filed a suit in Michigan state court before adding a 42 U.S.C. § 1983 claim, alleging the actions taken against him were done in violation of his First Amendment rights. *Id.* at 530.

⁶⁴ *Id.* at 531 (quoting *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006)).

⁶⁵ *Id.* at 534. The Sixth Circuit called it “axiomatic” that taking on the role of a union member of leader cannot be part of public employee’s official job duties. *Id.* Thus, public employees speaking on union matters must be speaking “as . . . citizen[s]” in the context of First Amendment analysis. *Id.*

⁶⁶ See *id.* (stating that a public employee’s official job duties cannot include any duty of acting as a member of a labor union).

⁶⁷ *Id.* To decide whether union speech touches upon “matters of public concern,” the court must evaluate the context of the speech and determine “the *point* of the speech in question.” *Id.* (quoting *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177, 1187 (6th Cir. 1995)).

concern.”⁶⁸ As a result, the court found that the officer spoke as a citizen, rather than an employee, on a “matter of public concern” when he contradicted his supervisor at the union contract arbitration meeting, and his statements were protected by the First Amendment.⁶⁹

B. Montero II’s Split with the Sixth, Seventh, and Ninth Circuits

Collectively, the rulings from the Sixth, Seventh, and Ninth Circuits demonstrate *per se* rules that protect union speech based on the idea that such speech cannot be deemed a part of a public employee’s official duties.⁷⁰ The Second Circuit, however, has taken a different approach to union speech in the context of First Amendment protection.⁷¹ *Montero II* built upon the Second Circuit’s 2010 ruling in *Weintraub v. Board of Education of City School District*, which held that a public school teacher’s union grievance was not protected by the First Amendment.⁷²

Although the facts in *Montero II* are similar to the scenarios at issue in *Swetlik*, *Fuerst*, *Ellins*, and *Boulton*—a police officer bringing a claim for

⁶⁸ *Id.* at 535. The Sixth Circuit reasoned that Boulton’s statements were against the interests of his union, as well as his personal interests, because they suggested that the Sherriff’s Office was not providing proper training in certain areas, and the remedy for this problem would be adding an additional staff position which would siphon funds away from union members. *Id.* Moreover, since Boulton’s comments dealt with training relating to the use of force—which is a requirement under Michigan state law—they dealt with “matters of public concern.” *Id.*

⁶⁹ *Id.* The Sixth Circuit noted that the defendants presented no significant interest in restricting Boulton’s speech. *Id.* Even though Boulton’s statements were protected under the First Amendment, the Sixth Circuit affirmed the district court’s grant of summary judgment to the county because Boulton failed to show that the actions taken against him were directly related to his speech. *Id.* at 528. Boulton had various allegations of misconduct surrounding him at the time of the contract negotiation meeting. *Id.* at 529. He failed to show that the actions against him were a direct result of his union speech as opposed to allegations of misconduct against him unrelated to his union speech. *Id.* at 528.

⁷⁰ *See id.* at 534 (holding that a union member who speaks on union matters speaks “as a citizen” for purposes of First Amendment protection); *Swetlik*, 738 F.3d at 826 (holding that because a police officer’s statements at a union meeting and in a union grievance were made in the context of his union membership, they were not made pursuant to his employment duties and were therefore protected); *Ellins*, 710 F.3d at 1060 (stating that natural conflicts exist between employers and unions of employees, and therefore holding that when police officers speak pursuant to their union membership, they do not speak as public employees); *Fuerst*, 454 F.3d at 774 (stating that a police officer’s statements made in the context of his union membership were not part of his job duties as a police officer).

⁷¹ *See Weintraub v. Bd. of Educ. of City Sch. Dist. of N.Y.C.*, 593 F.3d 196, 203 (2d Cir. 2010) (holding that speech can be “pursuant to” an employee’s official duties even when it is not a necessary part of the job). *Weintraub* involved a public school teacher who filed a union grievance after a student who repeatedly threw books at him was not disciplined. *Id.* at 199.

⁷² *Id.* at 198. The Second Circuit held that the teacher’s grievance was not private citizen speech because it was a necessary part of remedying his concerns about his ability to do his job, and because the average citizen could not file the kind of union grievance filed by the teacher. *Id.* at 203.

alleged retaliation against speech made in his capacity as a union official—the Second Circuit elected not to establish a *per se* rule to protect all union speech of this nature.⁷³ While the Second Circuit ruled that Montero himself spoke “as a private citizen,” it specifically refused to establish a rule that all employee speech in the union context is “private citizen” speech.⁷⁴ The Second Circuit has therefore split from the Sixth, Seventh, and Ninth Circuits on the issue of whether a public employee’s speech as a member of a union can possibly be part of his or her official duties.⁷⁵

III. UNION SPEECH AS DISTINCT FROM EMPLOYEE SPEECH

On June 27, 2018—just one month after the Second Circuit’s ruling in *Montero v. City of Yonkers*—the Supreme Court handed down its decision in *Janus v. American Federation of State, County, and Municipal Employees*, a pivotal case ruling that public employees cannot be compelled to pay union agency fees if they do not wish to be part of an employee union.⁷⁶ *Janus*

⁷³ See *Montero II*, 890 F.3d at 390, 399 (holding a police officer who claimed retaliation “spoke as a private citizen” when he made comments at union meeting, but refusing to establish a *per se* rule that any union member who speaks in that capacity “speaks as a private citizen”); *Boulton*, 795 F.3d at 534 (holding that a union member who speaks on union matters speaks “as a citizen” for purposes of First Amendment protection); *Swetlik*, 738 F.3d at 826 (holding that because a police officer’s statements at a union meeting and in a union grievance were made in the context of his union membership, they were not made pursuant to his employment duties and were therefore protected); *Ellins*, 710 F.3d at 1060 (stating that natural conflicts exist between employers and unions of employees, and therefore ruling that when police officers speak pursuant to their union membership, they do not speak as public employees); *Fuerst*, 454 F.3d at 774 (stating that a police officer’s statements made in the context of his union membership were not part of his job duties as a police officer).

⁷⁴ *Montero II*, 890 F.3d at 399. The Second Circuit relied on reasoning from *Weintraub* to reach this conclusion, holding that Montero’s statements were not “undertaken in the course of performing” or used as a “means to fulfill” his official duties. *Id.* (quoting *Weintraub*, 593 F.3d at 203).

⁷⁵ See *id.* at 390, 399 (holding a police officer who claimed retaliation “spoke as a private citizen” when he made comments at union meeting, but refusing to establish a *per se* rule that any union member who speaks in that capacity “speaks as a private citizen”); *Boulton*, 795 F.3d at 534 (holding that a union member who speaks on union matters speaks “as a citizen” for purposes of First Amendment protection); *Swetlik*, 738 F.3d at 826 (holding that because a police officer’s statements at a union meeting and in a union grievance were made in the context of his union membership, they were not made pursuant to his employment duties and were therefore protected); *Ellins*, 710 F.3d at 1060 (stating that natural conflicts exist between employers and unions of employees, and therefore ruling that when police officers speak pursuant to their union membership, they do not speak as public employees); *Fuerst*, 454 F.3d at 774 (stating that a police officer’s statements made in the context of his union membership were not part of his job duties as a police officer).

⁷⁶ See *Janus v. Am. Fed’n of State, Mun., & Cty. Emps.*, 138 S. Ct. 2448, 2460 (2018) (holding that systems which force public employees to pay for union activities even when they choose not to be union members violates the First Amendment). *Janus* arose from a suit brought by a child support specialist for the Illinois Department of Healthcare and Family Services regarding

overruled *Abood v. Detroit Board of Education*, which held that the “agency shop” system of union representation—in which all public employees represented by a union could be compelled to pay union fees equal to member dues regardless of whether they are union members—was constitutional.⁷⁷ In overruling *Abood*, the Court stated that the 1977 decision had allowed the First Amendment to be violated by agency-fee systems for forty-one years.⁷⁸

Although the question of union dues addressed by *Janus* is distinct from the question of whether union speech is the speech of private citizens, the Court’s ruling in *Janus* suggests that because public employees can no longer be forced to subsidize union activities, union speech cannot be characterized as speech that is required as part of a public employee’s job duties.⁷⁹ In light of this ruling, if given the chance to re-address the issue, the Second Circuit should follow the Sixth, Seventh, and Ninth Circuits and establish a rule that

union agency fees he was required to pay under state law regardless of his wish not to be a member of the union. *Id.* at 2461–62.

⁷⁷ *See id.* at 2459–60, 2478 (stating that *Abood* upheld a law that required public employees to pay dues to unions regardless of whether they were members, and that such a law is inconsistent with the First Amendment); *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209, 211, 236 (1977) (describing the “agency shop” system at issue), *overruled by Janus*, 138 S. Ct. 2448. *Abood* held that public employment may be conditioned on paying fees that fund collective-bargaining undertakings, but that employees who are not union members cannot be forced to pay for “ideological activities” that are not necessary to the collective bargaining process. 431 U.S. at 236; *see Janus*, 138 S. Ct. at 2460–61 (describing the union activities that nonmember public employees could be charged for under *Abood*). *Abood* noted the potential difficulties that could arise in attempting to distinguish between activities necessary for collective bargaining, and actions which promote a union’s ideological beliefs. 431 U.S. at 236. In *Janus*, the Court stated that modern unions often charge nonmembers for activities related to collective bargaining, as opposed only charging for pure collective bargaining costs. 138 S. Ct. at 2461.

⁷⁸ *Janus*, 138 S. Ct. at 2460.

⁷⁹ *See id.* at 2448, 2459–60, 2474 (stating that the system of forcing public employees to pay for union activities even when they are not union members violates the First Amendment, and that in their capacity as negotiating bodies, unions speak on behalf of the employees they represent, rather than their employers). *Janus* held that public employees cannot be forced to “subsidize” a union by being compelled to pay agency fees as nonmembers. *Id.* at 2460. Prior to this ruling, twenty-eight states had enacted laws prohibiting the sort of union dues that *Janus* objected to. *Union Agency Fees Violate First Amendment*, 36 MCQUILLIN MUN. L. REP. (Research Grp., Charlottesville, Va.), Aug. 2018, at 1; *see Janus*, 138 S. Ct. at 2466 (noting that twenty-eight states had already outlawed agency fees, and the number of public employees represented by unions in those states totaled in the millions). Additionally, federal law prior to *Janus* prohibited agency fees, meaning that almost one million federal workers were represented by unions but did not pay agency fees. 138 S. Ct. at 2466. By ruling that agency fees violate the First Amendment and are therefore unconstitutional, the Supreme Court held that public sector employees must be allowed to hold their jobs without subsidizing the unions that represent them. *See id.* at 2460, 2486 (concluding that systems which force public employees to pay union dues even when they disagree with union actions violates employees’ First Amendment rights). The Court also stated that the claim that a public employee’s official job duties encompass his or her speech as a union official “distorts” the realities of the collective bargaining process. *Id.* at 2474.

union speech is *per se* the speech of “private citizens” rather than public employees acting to fulfil their official duties.⁸⁰

By ruling that public employees cannot be forced to pay union agency fees because such fees violate their First Amendment rights, the Supreme Court has made a clear distinction between the duties and interests inherent in union membership, and a public employee’s official duties.⁸¹ This distinction aligns with the Ninth Circuit’s reasoning in *Ellins v. City of Sierra Madre* that government employers have an “inherent institutional conflict of interest” with the unions that represent public sector employees in collective bargaining agreements.⁸² Though *Janus* did not specifically address the issue of whether a public employee’s speech as a union member can constitute speech pursuant to the employee’s official duties, dicta in the case suggests that union speech cannot be characterized as speech in furtherance of a public employee’s job requirements.⁸³ The facts of *Montero II* serve as evidence of this assertion, since Montero’s criticism of other union members reflected his own

⁸⁰ See *Janus*, 138 S. Ct. at 2474 (stating that union speech is not equivalent to employer speech); *Boulton v. Swanson*, 795 F.3d 526, 534 (6th Cir. 2015) (holding that a union member who speaks on union matters speaks “as a citizen” for purposes of First Amendment protection); *Swetlik v. Crawford*, 738 F.3d 818, 826 (7th Cir. 2013) (holding that because a police officer’s statements at a union meeting and in a union grievance were made in the context of his union membership, they were not made pursuant to his employment duties and were therefore protected); *Ellins v. City of Sierra Madre*, 710 F.3d 1049, 1060 (9th Cir. 2013) (stating that natural conflicts exist between employers and unions of employees, and therefore ruling that when police officers speak pursuant to their union membership, they do not speak as public employees); *Fuerst v. Clarke*, 454 F.3d 770, 774 (7th Cir. 2006) (stating that a police officer’s statements made in the context of his union membership were not part of his job duties as a police officer).

⁸¹ See *Janus*, 138 S. Ct. at 2474 (stating that union speech is not equivalent to employer speech); *Ellins*, 710 F.3d at 1060 (describing the “inherent institutional conflict of interest” that exists between employers and unions of employees). Central to the Court’s reasoning is the idea that when an employee’s speech is part of his or her job duties, the speech is not really that of the employee, but rather is the employer’s speech. *Janus*, 138 S. Ct. at 2474. Therefore, “if the union’s speech is really the employer’s speech, then the employer could dictate what the union says,” which, of course, is not the case. See *id.* (stating that the Court presumes unions would dislike the claim that their employers could determine what union members can and cannot say).

⁸² *Ellins*, 710 F.3d at 1060. Based on this reasoning, the Ninth Circuit established its rule that public employees do not act pursuant to their employment duties when they speak as union members on union matters. *Id.*

⁸³ See *Janus*, 138 S. Ct. at 2474 (stating that when union representatives deal with their employers, they speak for the employees they represent, rather than the employers). Specifically, the Court stated that the structure of collective bargaining arrangements inherently means that employees speaking in their capacities as union members do not speak in their capacity as public employees because the interests of the union do not align with the interests of the employer. *Id.* This stems from the fact that when unions represent employees, their purpose is to negotiate with the employer on behalf of employees. See *id.* (“But when a union negotiates with the employer or represents employees in disciplinary proceedings, the union speaks for the employees, not the employer. Otherwise, the employer would be negotiating with itself and disputing its own actions.”).

personal views about the relationships and decisions made within the union, and could not, therefore, be deemed speech on behalf of his employer.⁸⁴

The Second Circuit was therefore incorrect in splitting from the Sixth, Seventh, and Ninth Circuits and declining to establish a *per se* rule that members of unions speak in their personal capacities rather than their capacities as employees.⁸⁵ The Second Circuit's decision suggests that there could be situations in which a union member speaking on union issues could speak pursuant to his or her official job duties.⁸⁶ This suggestion, however, contradicts the Supreme Court's assertion in *Janus* that if union speech is speech required by a public employee's job, then government employers can control what union members are allowed to say about union matters.⁸⁷ The Second Circuit should resolve the split and follow the Supreme Court's reasoning in *Janus* by establishing a categorical rule that when a public employee speaks as a union member, he or she speaks as an individual and not pursuant to his or her job duties.⁸⁸

⁸⁴ See *Janus*, 138 S. Ct. at 2474 (stating that when unions negotiate with their employers, they represent the employees rather than the employer itself); *Montero v. City of Yonkers (Montero II)*, 890 F.3d 386, 391–93 (2d Cir. 2018) (describing *Montero*'s criticism of other union members, and the subsequent actions taken against him by his supervisors). The Second Circuit made it clear that *Montero*'s speech could not be deemed speech pursuant to his job responsibilities because it did not help fulfill any of his job duties. *Montero II*, 890 F.3d at 399.

⁸⁵ See *Montero II*, 890 F.3d at 390, 399 (holding a police officer who claimed retaliation “spoke as a private citizen” when he made comments at union meeting, but refusing to establish a *per se* rule that any union member who speaks in that capacity “speaks as a private citizen”); *Boulton*, 795 F.3d at 534 (holding that a union member who speaks on union matters speaks “as a citizen” for purposes of First Amendment protection); *Swetlik*, 738 F.3d at 826 (holding that because a police officer's statements at a union meeting and in a union grievance were made in the context of his union membership, they were not made pursuant to his employment duties and were therefore protected); *Ellins*, 710 F.3d at 1060 (stating that natural conflicts exist between employers and unions of employees, and therefore ruling that when police officers speak pursuant to their union membership, they do not speak as public employees); *Fuerst*, 454 F.3d at 774 (stating that a police officer's statements made in the context of his union membership were not part of his job duties as a police officer).

⁸⁶ See *Montero II*, 890 F.3d at 399 (stating that it will not establish a *per se* rule that people speaking as members of labor unions always speak in their private capacities, rather than as part of their job duties). The Second Circuit did conclude, however, that *Montero* spoke in his private capacity because his statements did not help to fulfill his job duties. *Id.*

⁸⁷ *Janus*, 138 S. Ct. at 2474; see *Montero II*, 890 F.3d at 399 (choosing not to establish a *per se* rule that people speaking in their capacities as union members are speaking as private citizens rather than as part of their job requirements).

⁸⁸ See *Janus*, 138 S. Ct. at 2474 (stating that the argument that union speech is contained within the official duties of public employees “distorts collective bargaining and grievance adjustment beyond recognition”); *Montero II*, 890 F.3d at 390, 399 (holding a police officer who claimed retaliation “spoke as a private citizen” when he made comments at union meeting, but refusing to establish a *per se* rule that any union member who speaks in that capacity “speaks as a private citizen”); *Boulton*, 795 F.3d at 534 (holding that a union member who speaks on union matters speaks “as a citizen” for purposes of First Amendment protection); *Swetlik*, 738 F.3d at 826 (holding that because a police officer's statements at a union meeting and in a union grievance

CONCLUSION

The United States Court of Appeals for the Second Circuit incorrectly declined to establish a categorical rule that public employees who speak in their capacities as union members speak as private citizens and not as part of their employment duties. In its *Montero II* ruling, the Second Circuit split from the Sixth, Seventh, and Ninth Circuits, which had all established categorical rules that public employees do not act pursuant to their official duties when speaking as union representatives, but instead speak as private citizens. The categorical rules established by the Sixth, Seventh, and Ninth Circuits align with the Supreme Court's reasoning in *Janus* by making a clear distinction between union speech and speech that is required by a public employee's official job duties. By failing to adopt a categorical rule in this area, and thereby suggesting that some union speech could be part of a public employee's official duties, the Second Circuit has diverged from the Supreme Court's dicta in *Janus* stating that union speech cannot be part of a public employee's job responsibilities.

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were made in the context of his union membership, they were not made pursuant to his employment duties and were therefore protected); *Ellins*, 710 F.3d at 1060 (stating that natural conflicts exist between employers and unions of employees, and therefore ruling that when police officers speak pursuant to their union membership, they do not speak as public employees); *Fuerst*, 454 F.3d at 774 (stating that a police officer's statements made in the context of his union membership were not part of his job duties as a police officer).